IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-1163

ROSS SHADE,

*Appellant,*

VS.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

*Appellee.*

On Appeal From the Supreme Court of the State of California

## Motion to Dismiss or Affirm

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Dated: March 18, 1976

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vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Appellee.*

**On Appeal From the Supreme Court of the State of California**

## Motion to Dismiss or Affirm

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

### THE TARIFF PROVISIONS INVOLVED AND THE NATURE OF THE CASE

#### A. The Tariff Provisions

This appeal challenges the validity of tariff provisions of The Pacific Telephone and Telegraph Company (PT&T)

on file with Appellee. These provisions, contained in Tariff Schedule No. 36-T, are set out by Appellant in his Jurisdictional Statement (Juris. St., 3).

Generally, these provisions provide that damages arising out of mistakes or errors by PT&T shall be limited to an amount equal to the pro rata charges to the customer for the period during which the service or facilities was affected by the mistakes or errors. Liability of PT&T for errors caused by gross negligence is limited at $10,000. The limitation provisions do not apply to errors caused by willful misconduct, fraudulent conduct or violations of law.

### B. The Proceedings Below

The subject tariff provisions were established by Appellee in 1970 after investigation and hearing *(Limitation of Liability* (1970) 71 Cal. P.U.C. 229). In 1973, Appellant, together with William H. Faisst, filed a complaint before Appellee seeking, among other things, an order changing PT&T's limitation of liability rules. After hearing Appellee issued its Decision No. 84274 on April 29, 1975 declining to order a change in the contested rules.[1] A further order denying relief was issued by Appellee in Decision No. 84621, dated July 1, 1975.[2] Decisions Nos. 84374 and 84621 are not yet reported.

No opinion was rendered by the California Supreme Court. Instead, an order denying a petition for writ of review was issued October 30, 1975. On November 25, 1975, the California Supreme Court denied rehearing.[3]

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1. Decision No. 84374 is attached hereto as Appendix A to this motion.

2. Decision No. 84621 is attached hereto as Appendix B to this motion.

3. The orders of the California Supreme Court are attached to Appellant's Jurisdictional Statement.



## II

## ARGUMENT

### The Case Presents No Substantial Question

Appellant urges that he has been denied rights to equal protection and due process as secured to him by the United States Constitution (Juris. St. 4-5). Specifically, Appellant claims that (1) the subject limitation of liability provisions constitute unfair discrimination and (2) he was denied procedural due process because his complaint was heard by a hearing examiner and not heard by the Commissioners of Appellee or the California Supreme Court.[4]

Rules limiting liability have, for some time, been upheld when, as here, they are subject to regulatory authority. (See *Southwestern S & M Co. v. River Term. Corp.* (1959) 360 U.S. 411, 3 L.ed.2d 1334; *Western Union Teleg. Co. v. Esteve Brothers & Co.* (1921) 256 U.S. 566, 65 L.ed. 1094; *Waters v. Pacific Telephone Corp.* (1974) 12 C.3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753.) Appellant cites no authority to the contrary. Indeed, in many of the cases relied on by Appellant rules limiting liability were given effect (e.g., *Western Union Teleg. Co. v. Czizek* (1924) 264 U.S. 281, 68 L.ed. 682 and *Western Union Teleg. Co. v. Priester* (1928) 276 U.S. 252, 72 L.ed. 555 cited by Appellant in his Jurisdictional Statement at 7).

Appellant claims that the tariff provision, limiting liability for acts of gross negligence at $10,000, is invalid in that the term gross negligence is unclear (Juris. St., 10). Thus it is urged that gross negligence is a questionable concept of law (Juris. St., 4). This is not so. As pointed

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4. Appellant presents no argument at all with respect to the second contention. Instead, Appellant's argument is devoted entirely to the issue of the reasonableness of the limitation of liability provisions.

out in Appellee's decision establishing the subject tariff provision, the California courts and Legislature have used the standard of gross negligence without difficulty in many contexts. (See *Limitation of Liability, supra,* 71 Cal. P.U.C. at 232-233.) Appellant has failed totally to show that the use of gross negligence as a standard of conduct is constitutionally infirm. There is absolutely no authority cited by Appellant in support of this claim.

As indicated above, Appellant contends, without argument, that hearings before hearing examiner are repugnant to the due process of law as guaranteed by the Constitution (Juris. St., 5). To the contrary, the law at both state and federal levels does not require deciding officers to hear the evidence (*Allied Compensation Ins. Co. v. Industrial Accident Commission* (1962) 57 C. 2d 115, 367 P. 2d 409, 17 Cal. Rptr. 817; 2 Davis, Administrative Law Treatise (1958) 11.01 *et seq.*).



## III

## CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the California Supreme Court.

Respectfully submitted,

/s/ Richard D. Gravelle
Richard D. Gravelle

/s/ J. Calvin Simpson
J. Calvin Simpson

/s/ John S. Fick
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Dated: March 18, 1976

**(Appendices Follow)**

## *Appendix A*

Decision No. 84374

*Before the Public Utilities Commission of the State of California*

Case No. 9598
(Filed August 10, 1973;
amended October 23, 1973)

| | |
|---|---|
| Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership. Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants. | ) |

*Ross Shade* and *William H. Faisst,* for themselves, complainants.

*Richard Siegfried,* Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

### OPINION

This is a complaint by Ross Shade (Shade) and William H. Faisst (Faisst) against The Pacific Telephone and Telegraph Company (PT&T). The complaint relates to the limitation of liability provisions in PT&T's tariff and its practices thereunder.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis on December 17 and 18, 1973. It was submitted, after the filing of briefs and transcript, on February 14, 1974. On September 16, 1974, complainants filed a petition to set aside submission[1] seek-

1. Complainants entitled to document "Petition For Consideration of Additional Arguments Pending a Decision By the Commission."

ing to submit additional arguments. The Commission has carefully considered the matters raised in the petition and finds that it should be denied.

The facts in this matter are not seriously in dispute.

Findings of Fact

1. Shade and Faisst are certified public accountants. Shade has practiced his profession in San Francisco for 12 years.

2. Commencing January 1, 1971, Shade was associated with Joseph Harb, another CPA. They conducted their business under the name of Harb, Shade & Company. By March of 1972 another associate had been added and the business was conducted under the name of Harb, Shade & Ring. In March, 1972, Harb and Shade agreed to discontinue their partnership as soon as Shade could find appropriate office space at another location.

3. On or about June 1, 1972, Shade discussed the formation of a partnership with Faisst.

4. The closing date for listings in the 1973 San Francisco directory was June 28, 1972. The closing date for advertising was June 8, 1972.

5. It is the practice of PT&T's directory department to change all items of advertising to conform to main listings (white pages) received before the directory closing date.

6. By the middle of June 1972, Shade and Faisst had agreed to form an association and to conduct their business under the name of Shade, Faisst & Company.

7. During June 1972, Shade and Faisst leased office space for their business at 44 Montgomery Street, San Francisco.

8. On June 21, 1972 Shade and Faisst went to PT&T's Bush Street, San Francisco business office. At the business



office Shade first talked by telephone to a PT&T marketing representative who was located in another building. Shade requested a listing under the heading of Accountants—Certified Public for Shade, Faisst & Company and individual listings of the partners names in the yellow pages. The marketing representative informed Shade that PT&T would accept the firm listing which would appear in the yellow and white pages of the 1973 directory, but the individual listings were considered to be additional advertising and could not be accepted because it was past the closing date for accepting advertising. The marketing representative telephoned the appropriate information to a customer service representative, at the Bush Street office, who prepared a listing agreement form, which Shade signed. The information on the form correctly indicated that Shade, Faisst & Company was to be listed under the yellow page heading of Accountants—Certified Public.

9. The listing for Shade, Faisst & Company was improperly coded by some employee of PT&T to reflect that it should appear under the heading of Accountants—Public. As a result, the listing of Shade, Faisst & Company appeared in the 1973 San Francisco directory under the yellow page heading of Accountants—Public.

10. The failure to list Shade, Faisst & Company under the heading Accountants—Certified Public in the yellow pages of the 1973 San Francisco directory was an error by PT&T. This error diminished usefulness of the listing the one year in which the 1973 San Francisco directory was in use.

11. On April 3, 1972, PT&T accepted an advertising order from Harb, Shade & Ring for three extra lines of yellow page advertising to provide individual listings for each member of that firm. On June 26, 1972, PT&T re-

ceived a request from the firm that its listing should be changed to Harb, Levy, Weiland & Ring. PT&T instituted a service order to effectuate the change. On June 30, 1972, the advertising sales department questioned the change because of the lines of information associated with the listing. On July 5, 1972, the firm was contacted by PT&T and advised that the new listing was correct and that the lines of information should reflect the new listing. The 1973 directory yellow pages contained the listing of Harb, Levy, Weiland & Ring, with some corresponding individual listings, under the heading of Certified Public Accountants. No additional individual listings (lines of information) were added.

12. During the years indicated the number of PT&T directory listings, advertising published and errors were as follows:

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| White Page Listings | 5,025,000 | 4,980,000 | 5,100,000 |
| White Page Errors | 3,779 | 2,963 | 2,729 |
| Percentage of White Page Errors | .075% | .059% | .054% |
| Classified Listings and Items of Advertising | 1,910,000 | 2,006,000 | 2,038,000 |
| Classified Errors | 9,709 | 9,007 | 8,858 |
| Percentage of Classified Errors | .508% | .449% | .434% |
| Total White Page and Classified Listings and Advertisements | 6,935,000 | 6,986,000 | 7,138,000 |
| Total White Page and Classified Errors | 13,488 | 11,970 | 11,587 |
| Percentage of Errors | .194% | .171% | .162% |



13. During the years indicated PT&T's telephone directories had the following number of classified listings, advertisements, and errors:

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| Number of Classified Listings and Advertisements | 1,910,000 | 2,006,000 | 2,038,000 |
| Total Classified Errors | 9,709 | 9,007 | 8,858 |
| Number of Listings Under Wrong Heading | 401 | 388 | 337 |
| Percentage of Errors Under Wrong Heading | .021% | .019% | .017% |

14. During the years indicated, PT&T's San Francisco directory had the following number of listings, advertising, and errors:

| | 1970 | 1971 | 1972 | 1973* |
|---|---|---|---|---|
| White Page Listings | 320,649 | 314,369 | 312,003 | 312,170 |
| White Page Errors | 482 | 304 | 247 | 168 |
| Percentage of White Page Errors | .150% | .097% | .079% | .054% |
| Classified Listings and Items of Advertising | 126,101 | 129,569 | 131,582 | 134,193 |
| Classified Errors | 654 | 474 | 543 | 460 |
| Percentage of Classified Errors | .519% | .366% | .413% | .343% |
| Total White Page and Classified Listings and Advertising | 446,750 | 443,938 | 443,585 | 446,363 |
| Total White Page and Classified Errors | 1,136 | 778 | 790 | 628 |
| Percentage of Errors | .254% | .175% | .178% | .141% |

15. Shade, Faisst & Company is entitled to a credit allowance from PT&T in an amount equal to the basic main business exchange rate for a period of twelve months commencing September of 1972. No discrimination will result

*Includes 4th quarter of 1972.

from the payment of interest on reparations for that amount.

16. Shade, Faisst & Company filed an action in the superior court against PT&T seeking damages in connection with the aforesaid facts. PT&T takes the position in that litigation that there was no gross negligence involved and has refused to settle the case on a basis other than that of offering complainants a credit allowance.

The material issues in this proceeding are as follows: (1) Should the Commission enter an order changing the rules limiting the liability of telephone corporations? (2) Are complainants entitled to any relief because their firm was listed under the heading Accountants—Public rather than Accountants—Certified Public in the 1973 San Francisco directory? (3) Did PT&T discriminate against complainants by accepting listings and/or items of advertising from other persons after the applicable closing dates for the 1973 San Francisco directory? (4) Are PT&T's practices in connection with the acceptance and transmitting of new listings to its directory department unjust, unreasonable, unproper, inadequate, or insufficient? (5) Did PT&T act in an arbitrary, unjust, or improper manner when it declined to enter into a settlement of the superior court action with complainants on a basis other than that of a credit allowance?

Complainants first contend that the Commission should remove the rules limiting liability of telephone corporations so they can recover in the superior court action damages without limitation against PT&T for the error which is the subject of this complaint. In the *Limitation of Liability* case (1970) 71 CPUC 229, the Commission most recently considered the question of the limitation of liabilities of telephone corporations. After statewide hearings, we held that



there was no limitation of liability for tortious conduct, we ordered telephone corporations to adopt tariffs providing for liability in amounts not to exceed $10,000[2] for gross negligence, and we authorized them to adopt tariff provisions limiting liability for ordinary negligence to specified credit allowances. Complainants' arguments are similar to ones advanced in the *Limitation of Liabilities* case. Complainants presented no evidence on these issue which would impel us to change the rules dealing with the limitation of liability of telephone corporations.

Complainants next contend that PT&T acted arbitrarily and improperly by refusing to settle the superior court action filed against it by complainants. There is no merit in this contention. The record indicates that PT&T admits that an error occurred and has offered complainants 100 percent credit allowance for the year in question. PT&T denies that any gross negligence is present under the facts presented. Under the limitation of liability rules, heretofore discussed, gross negligence is a prerequisite for the maintenance of complainants' superior court action. Complainants argue that litigants often enter into compromise settlements of lawsuits, even though they believe in the correctness of their position, in order to minimize the cost of litigation. Complainants take the position that PT&T expends more money in defending lawsuits, such as their superior court action, than would be expended if they entered into compromise settlements. They ask the Commission to order PT&T to enter into good faith compromise settlements in such instances, which would benefit PT&T's ratepayers as well as the litigants.

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2. The decision limits liability for gross negligence to $2,000 for telephone corporations having gross revenues of $1,000,000 or less and $10,000 for telephone corporations having gross revenues over $1,000,000.

Complainants' contention that the net cost of settling all litigation would be less than the results of prosecuting it is entirely without factual support in this record. Furthermore, mandating such a policy could evoke the filing of numerous nuisance value actions which would inure to the disadvantage of PT&T's ratepayers. Even if it be assumed that the Commission has jurisdiction to enter the type of order contended for by complainants,[3] the facts in this proceeding do not call for the exercise thereof. Since a superior court action is pending between the parties, we believe it inappropriate to discuss in detail PT&T's refusal to settle that litigation on other than a credit allowance basis.[4] Our examination of the record leads us to find that PT&T did not act improperly, arbitrarily, or unreasonably

3. The Commission has ordered utilities subject to its jurisdiction to prosecute or defend matters cognate and germane to their utility activities. (*PG&E Co.*, etc. (1957) 56 CPUC 66, 67; *PG&E Co.* (1959) 57 CPUC 236, 248; *So. Cal. Gas Co.* (1959) 57 CPUC 250, 259; *So. Cal. Gas Co.* (1959) 57 CPUC 262, 270-71.) If a utility were to engage in a calculated course of unnecessary litigation, the Commission could disallow the expenses thereof in an appropriate rate proceeding. (*Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 C 2d 634, 659, 668-70.) We express no opinion on the question of whether the Commission could, consonant with due process, order a utility subject to its jurisdiction to compromise its claim or not assert a defense which it in good faith believes to be applicable in a superior court action involving a matter (e.g. awarding damages for gross negligence) over which the Commission has no jurisdiction. We are not here considering situations in which there have been prior Commission orders or factual determinations or in which the Commission has paramount jurisdiction. (*Pacific Tel. & Tel. Co. v. Superior Court* (1963) 60 C 2d 426, 430; *Miller v. Railroad Commission* (1937) 9 C 2d 190, 195, 197-98; *R. E. Tharp, Inc. v. Miller Hay Co.* (1968) 261 CA 2d 81; *People ex rel Public Utilities Commission v. Ryerson* (1966) 241 CA 2d 115; *Pratt v. Coast Trucking, Inc.* (1964) 228 CA 2d 139.)

4. In order to award a credit allowance (reparations) it is only necessary to determine that a mistake, error or omission, etc. occurred. (71 CPUC 229, 251 *et seq.*) The Commission does not award damages for gross negligence. (*Waters v. Pacific Telephone Company* (1974) 12 C 3d 1, 8-9.)



in refusing to settle the superior court action on a basis other than that of a credit allowance.

The remaining issue to be considered is whether PT&T discriminated against complainants. Public Utilities Code Section 453 provides in part:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

Complainants base their charge of discrimination on the fact that PT&T changed the lines of information listings for Harb, Levy, Weiland & Ring after June 8, 1972 but would not sell Shade, Faisst & Company lines of information after that date.

The Commission finds that no discrimination occurred under the facts herein presented. "Whenever a line must be drawn, there is little that separates the cases closest to it on either side." (*Wood v. Public Utilities Commission* (1971) 4 C 3d 288, 296; appeal dismissed for want of substantial federal question 404 U.S. 931.) Common sense indicates that if PT&T is to publish and distribute directories annually, deadlines must be established. The establishment of an earlier deadline for advertising (including informational listings) than for regular listings does not appear to be unreasonable. Since there is also a deadline for listings, the practice of changing advertising to conform to listings is also not unreasonable. There is a difference in making changes within directory advertising space already allocated and adding additional content requiring more space. As indicated, PT&T accepted an advertising order on April 3, 1972 for lines of information for the then

firm of Harb, Shade & Ring. This was before the June 8, 1972 cutoff date for acceptance of advertising. On June 26, 1972, the firm changed its main listing and asked that the lines of information reflect the new listing. No additional lines of information were added. The June 26th request was before the June 28, 1972 cutoff date. Under these facts, no discrimination occurred.

No other points require discussion. The Commission makes the following additional findings and conclusions.

Findings of Fact

17. There is no evidence in this record which would require the Commission to change the rules dealing with the liability of telephone corporations as set forth in the *Limitation of Liability* case 71 CPUC 229.

18. PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action which complainants brought against it on a basis other than that of a credit allowance.

19. PT&T did not discriminate against complainants when it refused to accept advertising (lines of information) on June 21, 1972, for publication in PT&T's 1973 San Francisco directory.

Conclusions of Law

1. PT&T should be ordered to grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate for the period of one year commencing September 1972, with interest at the rate of 7 percent per annum from September 1973 to the payment or crediting thereof.

2. Complainants are entitled to no other relief in this proceeding.



ORDER

It Is Ordered that The Pacific Telephone and Telegraph Company shall grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate charged Shade, Faisst & Company for the period of one year commencing September, 1972. The credit allowance shall bear interest at the rate of 7 percent per annum from September 1973 to the date of payment thereof (if paid in cash) or the date credited against accrued outstanding charges.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of April, 1975.

VERNON L. STURGEON
President
WILLIAM SYMONS, JR.
D. W. HOLMES
LEONARD ROSS
ROBERT BATINOVICH
Commissioners

## *Appendix B*

Decision No. 84621

*Before the Public Utilities Commission of the State of California*

Case No. 9598
(Filed August 10, 1973;
Amended October 23, 1973)

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership,
Complainants,

vs.

The Pacific Telephone and Telegraph Company,
Defendants.

ORDER DENYING RELIEF

On May 9, 1975, complainants, Ross Shade and William H. Faisst filed a "Petition for Reconsideration and to Amend Decision No. 84374". Attached to this filing is a document entitled "Petition Requesting the Public Utilities Commission to Withdraw Decision No. 84374 Forthwith".

We have considered fully the assertions and arguments presented and, except for the discussion immediately following, are of the opinion that good cause for relief has not been made to appear.

In Decision No. 84374 we specifically recognized that The Pacific Telephone and Telegraph Company's (PT&T) practices in connection with the acceptance and transmission of new listings to its directory department were a material issue. After reviewing the instant filing and the record herein, we are of the opinion that PT&T's practices in this regard are not unjust, unreasonable, improper, inadequate or insufficient.



PT&T's procedures were fully described at the hearings. Exhibit No. 14 is a flow chart which shows the carefully drawn steps developed to handle new listings. A minor change did occur in new listing procedures between 1972 and the present. However, we are unable to find fault with either the past or present procedures.

In the instant filing, petitioners specifically refer to (1) information given them regarding cut-off dates for listings and (2) the preparation and use of "contract memoranda" and "listing agreement forms" by PT&T. We cannot, based on the record established, find that these matters evidence a shortcoming in PT&T's procedures.

Therefore, It Is Ordered that:

1. Decision No. 84374 is hereby modified by the inclusion therein of the following findings of fact:

> "20. PT&T's practices in connection with the acceptance and transmitting of new listings in its directory department have not been shown to be unjust, unreasonable, improper, inadequate or insufficient."

2. Further relief with respect to Decision No. 84374, as modified hereinabove, is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 1st day of July 1975.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturegon
Robert Batinovich
Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.